JERRY NGIAM SWEE BENG

v.

ABDUL RAHMAN MOHD RASHID & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI JC
[PETITION NO: D9-28-850-2000]
5 FEBRUARY 2001

COMPANY LAW: *Winding-up - Opposition to petition - Affidavits opposing petition - Whether served on time on petitioner - Whether requirement under Companies (Winding-Up) Rules 1972, r. 30(1) mandatory - Whether affidavits admissible - Applicability of Rules of High Court in winding up proceedings*

The petitioner filed a petition under s. 218(1)(f) & (i) of the Companies Act 1965 for an order that the 2nd respondent be wound up and it was duly served on both the 1st and 2nd respondents on 18 October 2000. The respondents filed their notice of intention to oppose the petition and supported it by giving their grounds of objection in two affidavits served on 7 December 2000 and 12 December 2000 respectively. At the hearing on 14 December 2000, the petitioner raised a preliminary objection against both the said affidavits on the ground that they had failed to comply with r. 30(1) of the Companies (Winding-Up) Rules 1972 ('the Rules').

The main issues before the court were: (i) whether the requirement under r. 30(1) of the Rules is mandatory; (ii) what is the relevant law for the proper computation of time under r. 30(1) of the Rules; (iii) whether the filing and service of both the affidavits were done within the stipulated time period; (iv) if not, whether it was proper for the court to exercise its discretion under O. 92 r. 4 Rules of the High Court 1980 ('RHC'); and (v) whether the respondents were given prior notice of the preliminary objection and whether they were given the right to be heard.

Held:

[1] The requirement under r. 30(1) of the Rules is mandatory. The court had no discretion to admit the affidavits as they had failed to comply with r. 30(1) of the Rules.

[2] The RHC had no application in the present winding up proceedings. There are specific rules for winding up, *ie*, the Rules. Here, since the Rules did not provide for computation of time, s. 54 of the Interpretation Acts 1948 & 1967 ('the IA') applied. The words "exclusive of the day on which the event happens" in s. 54(1)(a) of the IA, in line with r. 30(1) of the

Rules which requires "at least seven days before the time," clearly exclude the date of hearing of the petition in the computation of time. Both the day of service and the day of hearing must be excluded from the computation of time.

[3] Thus, for an affidavit in opposition to the petition to be admitted as evidence at the hearing fixed on 14 December 2000, it should have been served on the petitioner at the latest by 6 December 2000. The 1st affidavit dated and served on 7 December 2000 was clearly out of time by one day. The 2nd affidavit dated and served on 12 December 2000 was out of time by six days.

[4] The RHC has no place in winding up proceedings and therefore O. 92 r. 4 RHC was not applicable here.

[5] The respondents had received every opportunity to answer the preliminary objection with proper authorities. The complaint of "no prior notice" was thus without merit. The respondents were also given more than two months to exercise the "right to be heard" by preparing affidavits within the stipulated time. Thus the question of natural justice being shut out was misconceived.

[Petitioner's preliminary objection allowed; 2nd respondent wound up.]

Case(s) referred to:

Crocuses & Daffodils (M) Sdn Bhd v. Development and Commercial Bank Bhd [1997] 3 CLJ 485 ***(foll)***
Datuk Bandar Kuala Lumpur v. Seman Amat & Ors [1996] 3 CLJ 263 ***(refd)***
Dr Woo Kin Chong v. Mary Ou Holdings Sdn Bhd [1997] 5 CLJ 164 ***(refd)***
Gurbachan Singh v. Seagrott & Campbell (No 2) [1962] 28 MLJ 370 ***(refd)***
Jasabena Sdn Bhd v. Beh Heng Poo & Anor [1985] 1 MLJ 394 ***(refd)***
Lai Kim Loi v. Dato' Lai Fook Kim & Anor [1989] 2 CLJ 107 ***(foll)***
Ooi Chew Seng v. Ultratech Sdn Bhd [1997] 5 CLJ 421 ***(refd)***
Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong [1996] 3 CLJ 321 ***(refd)***
Rightside Properties Ltd v. Gray [1974] 2 All ER 1169 ***(refd)***
Sneath v. Calley Gold Ltd [1893] 1 Ch 477 ***(refd)***
The Lyn Country Sdn Bhd v. EIC Clothing Sdn Bhd & Anor [1996] 4 CLJ 828 ***(foll)***

Legislation referred to:

Companies Act 1965, ss. 218(1)(f), (i), 221(2)(b), 372
Companies (Winding-up) Rules 1972, r. 30(1), 193
Courts of Judicature Act 1964, s. 16
Interpretation Acts 1948 & 1967, ss. 2(1), (2), (3), 54(1)(a), (d)
Rules of the High Court 1980, O. 1 r. 2(1), (2), (3), O. 2 r. 2, O. 3 rr. 2, 5, O. 92 r. 4

Other source(s) referred to:
Halsbury's Law of England, vol 45, para 1133

For the petitioner - K Gomes; M/s Sabarudin Othman & Ho
For the respondents - A Faizal Mohamed; M/s Yacob & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Ramly Ali JC:

Introduction

On 4 October 2000, the petitioner had filed a petition (encl. 1) pursuant to s. 218(1)(f) and (i) of the Companies Act 1965, for an order that the 2nd respondent be wound-up. The said petition was duly served on both the 1st and 2nd respondents on 18 October 2000. On 7 December 2000, both the respondents filed in their notice of intention to appear on petition, to oppose the said petition. The grounds of the objection against the petition are as stated in "the affidavit in opposition to the winding-up petition" dated, filed and served on 7 December 2000 and the respondents second affidavit-in-reply dated, filed and served on 12 December 2000, both affirmed by the 1st respondent.

On the hearing date of the petition ie, 14 December 2000, the petitioner through his solicitor has raised a preliminary objection against both the respondents' affidavits on the grounds that the said affidavits had failed to comply with r. 30(1) of the Companies (Winding-up) Rules 1972 (the 1972 Rules). The rule states that such affidavits should be served on the petitioner or his solicitor at least seven days before the time appointed for the hearing of the petition ie, 14 December 2000. On the hearing date (14 December 2000) the court had directed both parties to submit their written submissions on the preliminary objection. The relevant dates given are as follows:

i) Petitioner's submissions – 3 January 2001

ii) Respondents' submissions – 17 January 2001

iii) Petitioner's reply – 29 January 2001

iv) Court decision – 5 February 2001

Petitioner's Submissions

The petitioner submitted that the requirement under r. 30(1) the 1972 Rules is mandatory. As both the respondents affidavits (dated 7 December 2000 and 12 December 2000) had failed to comply with the said rule, both the affidavits

cannot be admitted as evidence and therefore since there are no averments to support the respondents' opposition, the petitioner is entitled for an order in terms of the petition (encl. 1). The petitioner contended that the 1st affidavit (dated and served on 7 December 2000) was only served on the petitioner six days before the hearing date, 14 December 2000. While the 2nd affidavit (dated and served on 12 December 2000) was clearly out of time ie, only two days before the hearing date. The petitioner prays that the preliminary objection be allowed with costs.

Respondents' Submissions

The respondents contended that both the affidavits in question had all been filed and served within the statutory time frame limit. Furthermore, at any material time the respondents have not infringed the statutory requirement of r. 30(1) of the 1972 Rules. The first affidavit was clearly served within seven days prior to the hearing date (14 December 2000) as the computation of time should start from 7 December 2000, (date of service). As for the 2nd affidavit, the respondents contended that it is meant to reply to the petitioners affidavit dated 9 December 2000. As such it should also be accepted as it forms part and parcel of the whole object of the respondent replying to the petitioner's petition. In the alternative, if the law did not favour the respondents in the point, the merit of the respondents affidavits should have been taken into account as the court has a duty to exercise its discretion under O. 92 r. 4 of the Rules of the High Court 1980, (RHC 1980) in order to ensure that there is no miscarriage of justice done. The respondents thus pray that the preliminary objection be dismissed with costs.

Main Issues

The main issues before the court on the preliminary objection are as follows:

(i) whether the requirement under r. 30(1) of the 1972 Rules is mandatory;

(ii) what is the relevant law for the proper computation of time for the purpose of r. 30(1) of the 1972 Rules;

(iii) whether the filing and service of both the affidavits were done within the stipulated time period under r. 30(1) of the 1972 Rules;

(iv) if not, whether it is proper for the court to exercise its discretion under O. 92 r. 4 RHC 1980 to cure such non-compliance.

Whether The Requirement Under Rule 30(1) The 1972 Rules Is Mandatory

The relevant Rule 30(1) of the 1972 Rules states:

> 30(1). Affidavits in opposing to a petition that a company may be wound up **shall** be filed and a copy thereof served on the Petitioner or his solicitor at least seven days before the time appointed for the hearing of the petition.

The word "shall" as being used in the above provision indicates the mandatory nature of the requirement. In *Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong* [1996] 3 CLJ 321, the Court of Appeal had equated the meaning of the word "must" as that given to the word "shall" and had interpreted the word "must" to mean as implying a peremptory mandate as opposed to a mere direction or discretion. The choice of the word "must" (or for that matter the word "shall" in our present case) does not create the existence of any discretion or empowers the court to exercise any discretion.

In a recent case of *Crocuses & Daffodils (M) Sdn. Bhd v. Development and Commercial Bank Bhd* [1997] 3 CLJ 485, the Court of Appeal had considered in turn, all the four affidavits in opposition that were filed against a petition and dealt with them one by one. Their conclusions were that each of the affidavits did not comply with r. 30(1) of the 1972 Rules and therefore would not be admitted as evidence. Siti Norma JCA (as she was then) in that case ruled that:

> By their words and expression, r. 30(1) is mandatory in nature and as such, the learned judge was correct when he refused to admit all 4 affidavits in opposition for non-compliance of that particular rule. The fact that the four affidavits were only relied upon on 24 November 1995 does not alter the position as such affidavits were intended for use in the earlier hearings which never took place as all the earlier hearings were adjourned for some reason or other.

Based on the above authorities, I am of the opinion that the answer to issue no. 1 should be in the affirmative ie the requirement under r. 30(1) of the 1972 Rules is mandatory, leaving this court with no discretion to admit the affidavits if they fail to comply with such requirement. It seems clear to me that there must be strict compliance with the particular rule. Any application to oppose the petition must fully and strictly comply with the said rule.

The Relevant Laws For The Proper Computation Of Time

The counsel for the petitioner argued that since the 1972 Rules do not provide for the computation of time, the court should invoke s. 54 of the Interpretation Act 1967 for that purpose. The counsel for the respondents, on the other hand argued that the reckoning of time should be based on the relevant provisions of the Rules of the High Court 1980 particularly O. 3 r. 2. He cited O. 1 r. 2(1) RHC 1980 which states:

> Subject to the provision of this rule, these rules shall have effect in relation to all proceedings in the High Court, including any pending proceeding there in.

It is pertinent at this stage for me to determine whether the RHC 1980 applies to winding-up proceedings. Order 1 r. 2(2) RHC 1980 provides that the RHC 1980 shall not have effect in relation to proceedings in respect of which rules have been or may be made under any written law for the specific purpose of such proceedings. Order 1 r. 2(3) further provides that in the case of the proceedings for which rules have been made, nothing in para. (2) shall be taken as affecting any provision of any rules (whether made under the Act or any other written law) by virtue of which the RHC 1980 or any provisions thereof applied in relation to any of those proceedings.

For winding-up proceedings, we have specifics rules to follow ie, the Companies (Winding-up) Rules 1972 (the 1972 Rules) made by the Rules Committee under s. 372 of the Companies Act 1965 and s. 16 of the Court of Judicature Act 1964. There is nothing under the present 1972 Rules which say that the provisions of the RHC 1980 shall apply to winding up proceedings. So, the provisions of O. 1 r. 2(1) RHC 1980 as cited by the counsel for the respondents in his submission cannot stand on it's own. It must be read and interpreted "subject to the provision of r. 2(2) and r. 2(3)". Under the old version of the Companies (Winding-up) Rules 1946, r. 210 provides that in all proceedings in or before the court, under the (Companies) Ordinance and Rules, where no other provision is made by the Ordinance or Rules, the practice, procedure and regulations shall, unless the court otherwise in any special case directs, be in accordance with the rules and practice of the court. However, the said r. 210 had been excluded from the present 1972 Rules. The intent and purpose of excluding such a provision from the 1972 Rules must be for a specific purpose – ie, to exclude the application of the RHC 1980 in winding-up proceedings. The wisdom of the Rules Committee in specifically excluding the said provision must be given due consideration.

In *Lai Kim Loi v. Dato' Lai Fook Kim & Anor* [1989] 2 CLJ 107, the Supreme Court, in dealing with a case of a company's winding-up petition had held that "in such a case the RHC 1980 do not apply. The 1972 Rules apply". The said decision was followed by Kamalanathan Ratnam JC (as he was then) in *The Lyn Country Sdn. Bhd. v. EIC Clothing Sdn. Bhd & Anor* [1996] 4 CLJ 828, where he held that the RHC 1980 do not apply to a winding-up petition under s. 218 of the Companies Act 1965, and thus gave judgment for the petitioner. (The respondents in that case, appealed to the Court of Appeal *vide* Civil Appeal Nos. W-02-91-96 and W-02-92-96. The said appeal was heard on 9 and 10 December 1996 by Gopal Sri Ram, NH Chan and Abu Mansor JJCA. The appeal was dismissed with costs).

In the premise, I find that the RHC 1980 has no application to our present winding-up proceedings.

Since the 1972 Rules do not provide for computation of time, it is only appropriate that the Interpretation Act 1967 (Act 388) should apply in this case. Section 2(2), (3) of the Act provides:

> (2) PART I shall not apply for the interpretation of or otherwise in relation to any written law not enumerated in subsection (1)
>
> (3) PART I shall not apply where there is:
>
> a) express provision to the contrary; or
>
> b) something in the subject or context inconsistent with or repugnant to its application.

The 1972 Rules is enumerated under s. 2(1) of the Interpretation Act. The said rules contained no express provision to the contrary. There is also nothing in the subject or context in the rules inconsistent with or repugnant to its application. Therefore the Interpretation Act will apply if no other provision are available. Section 54 of the Act deals with the computation of time. Section 54 reads:

> 54. Computation of time
>
> (1) In computing time for the purpose of any written law:
>
> a) A period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;
>
> b) If the last day of the period is a weekly holiday or a public holiday (referred to in this subsection as excluded days) the period shall include the next following day which is not an excluded day;
>
> c) Where any act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next following day which is not an excluded day; and
>
> d) Where any act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

Reading carefully s. 54(1)(a) of the Act, it is clear that "a period of days from the happening of an event shall be deemed to be exclusive of the day on which the event happens". This is in line with the provision under r. 30(1) of the 1972 Rules which requires that a copy of the affidavit opposing the petition shall be served on the petitioner or his solicitor at least seven days **before the time** appointed for the hearing of the petition. I am of the view that the

words "before the time" (in r. 30(1)) and "exclusive of the day on which the event happens" (in s. 54(1)(a) of the Act) clearly exclude the date of hearing of the petition in the computation of time.

When does the period of seven days start? Should the day of the service of the affidavit be taken into account or left out in the computation of time? The phrase "**at least seven days before** become paramount in its definition for the purpose of computation of time. The words "at least" has been defined on numerous occasions. In *Halsbury's Law of England*, vol. 45, para. 1133, it is stated that:

> In many statutes, statutory rules and bylaws the intention to exclude both days and to give the person affected a clear interval of time between the two is put beyond all doubt by the insertion of the words such as "clear days" or so many days "at least".

In *Rightside Properties Ltd v. Gray* [1974] 2 All ER 1169, it was held that a condition requiring "at least twenty-one days' notice" meant twenty-one days exclusive of the day of service and the day of expiry of the notice. In *Sneath v. Calley Gold Ltd.* [1893] 1 Ch. 477 at p. 488, it was held where for the purpose of a requirement of "at least fourteen day's notice" the day of the notice of a company meeting and the day of the meeting were both excluded.

Being guided the above principles, I am of the view that in computation of the seven days period under r. 30(1) of the 1972 Rules in the present case, both the day when service was affected and the day fixed for hearing of the petition must be excluded. Thus, for an affidavit in opposition to petition to be admitted as evidence at the hearing fixed on 14 December 2000, it must have been served on the petitioner the latest by 6 December 2000. The seven days period should only include 7 December 2000, 8 December 2000, 9 December 2000, 10 December 2000, 11 December 2000, 12 December 2000 and 13 December 2000. Section 54(1)(d) of the Interpretation Act does not apply to our present case as the time or days in dispute exceeds six days. Thus, for the 1st affidavit dated and served on 7 December 2000, it was clearly out of time by one day. While the 2nd affidavit dated and served on 12 December 2000, it was also out of time by six days.

Whether The Court Can Exercise Discretion Under Order 94 Rule 4 RHC 1980

In the course of his submissions, the counsel for the respondents had urged this court to invoke O. 92 r. 4 or O. 3 r. 5 of the RHC 1980, to exercise it's discretion to ensure that there is no miscarriage of justice and to accept the said affidavits for the purpose of the petition.

As I have concluded earlier the RHC 1980 do not apply to winding-up proceedings. Thus it is not proper for me to rely on O. 92 r. 4 or O. 3 r. 5 of the RHC 1980 to save the situation faced by the respondents in this case. In *The Lyn Country Sdn. Bhd. v. EIC Clothing Sdn. Bhd (supra)* the court had rejected the same request under O. 92 r. 4 of the RHC 1980 based on the same ground ie, that the RHC 1980 has no place in winding-up proceedings.

The only provision that give the court inherent power on issues submitted by the counsel for the respondents in this case, to my mind, is s. 221(2)(b) of the Companies Act 1965 and r. 193 of the 1972 Rules. Section 221(2)(b) states:

> (2) The Court may on the petition coming on for hearing at any time **on the application of the petitioner, the company or any person who has given notice that he intends to appear on the hearing of the petition;**
>
> (b) dispense with any notices being given or steps required by this Act, or by the rules, or by any prior order of the Court;

Rule 193 of the 1972 Rules states:

> The Court may, in any case in which it shall see fit extend or abridge the time appointed by these Rules or fixed by any order of the Court for doing any act or taking proceedings.

In appropriate case, if there are sufficient grounds to do so, the court may exercise the discretion. However, in this particular case, I am not able to do so because, in the first place, there is no application made by the respondents, "as persons who have given notice that they intend to appear on the hearing of the petition", under those provisions. In fact the respondents made no mention at all about these provisions in their submissions. Secondly, if at all the respondents have made such an application, I do not think it is a proper case for the court to exercise such discretion in view of the fact that the Court of Appeal in *Crocusers & Daffodils (M) Sdn. Bhd. v. Development and Commercial Bank Bhd. (supra)* had held that the requirement under r. 30(1) of the 1972 Rules is mandatory. Being mandatory requirement, I feel the court has no discretion to order otherwise.

Prior Notice Of The Preliminary Objection

The counsel for the respondents had also complained that the petitioner had raised the preliminary objection on such a short notice and that no notice has been given to him until the hearing date (14 December 2000) itself. Therefore, the respondents contended that the preliminary objection raised by the petitioner is contumelious vexatious, frivolous, *mala fide* with the intention

to sway the court from the merit of the respondents' contention. In *Datuk Bandar Kuala Lumpur v. Seman bin Amat & 2 Others* [1996] 3 CLJ 263, Abdul Kadir Sulaiman J (as he was then) held that it is a good practice for a party intending to raise a preliminary objection to do so by giving prior notice. He went on to say that, however, it is not the law that the absence of prior notice will totally shut the door for the intended objector from raising the objection. The principle behind the need for prior notice is merely to avoid surprise, so that the other side would have sufficient time to counter it, if need be. The same observations were made in *Jasabena Sdn. Bhd. v. Beh Heng Poo & Anor* [1985] 1 MLJ 394 and *Gurbachan Singh v. Seagrott & Campbell (No 2)* [1962] 28 MLJ 370. The same ruling was followed by Nik Hashim JC (as he was then) in *Ooi Chew Seng v. Ultratech Sdn. Bhd.* [1997] 5 CLJ 421 and *Dr. Woo Kin Chong v. Mary Ou Holdings Sdn. Bhd.* [1997] 5 CLJ 164. In *Jasabena*'s case *(supra)* even though no prior notice of the preliminary objection was given, the court went on to hear the preliminary objection of the respondent, but for lack of merit, the court dismissed it. In our present case, on the day of the hearing of the petition ie, 14 December 2000 the counsel for the petitioner raised the issue relating to the preliminary objection at the outset of the hearing. The court then directed both sides to submit their written submissions respectively on the issue raised. For that matter, the counsel for the petitioner was directed to file his written submissions on or before 3 January 2001 and the counsel for the respondents to do so on or before 17 January 2001. In other words the counsel for the respondents has got more than one month (from 14 December 2000 when the preliminary objection was raised in court) to do his research and to answer the preliminary objection. In fact he got two weeks to go through the petitioners written submissions (ie, from 3 January 2001 to 17 January 2001) before submitting his own submissions. Every opportunity has been given to the respondents to answer the objection with proper research and authorities. In that sense, the respondents were not prejudiced of anything. So the complaint about "no prior notice" of the preliminary objection is without merit and should be disregarded.

Right To Be Heard (Audi Alteram Partem)

At the end of his submissions, the counsel for the respondents also argued that to disallow the two affidavits from being admitted as evidence in the petition proceeding would evidently shut the natural justice door towards the respondents right to be heard of the maxim *audi alteram partem*. I think this argument is also without merit and should be disregarded as far as this particular case is concerned. Everyone knows that all parties to a litigation or any proceeding in court, be it civil or criminal in nature, must be accorded the right to be heard so that they have a fair chance and opportunity to prepare and represent their case. However this right or opportunity is governed by

relevant rules and laws, particularly regarding procedures. Rules and laws are made to achieve this purpose, after taking into consideration the rights and interest of all the parties, not only one side. So, in order to ensure fair play in any proceeding, all parties must comply with the relevant rules and laws. In our present case, the Companies Act 1965, the Companies (Winding-up) Rules 1972 and the Interpretation Act 1967 are there to be followed and complied with by both the petitioner and the respondents. From the records of the proceedings, the petition (encl. 1) and all the relevant papers were duly served on both the respondents on 18 October 2000 with an endorsement that "the petition shall be heard at the High Court at Kuala Lumpur on 14 day of December 2000 at 9 o'clock in the forenoon". In other words, both the respondents were given almost two months (ie, 18 October 2000 to 14 December 2000) to exercise his "right to be heard" by preparing and filing his affidavits within the stipulated time. So the question of the natural justice door being 'shut' towards the respondents in this case does not arise. The 'door' was widely opened for him for almost two months. But I must stress here that the 'door' will not be continuously opened forever. If the respondents fail to 'enter' while the 'door' is opened, then they should be blamed. The interest of the petitioner in this case should not be sacrificed just because the respondents failed to adhere to the relevant rules in exercising this so-called "right to be heard". The petitioner also has this "right to be heard" ie, his petition (encl. 1) to be heard without undue delay in accordance with the relevant rules.

Conclusions

In the present circumstances and based on the above grounds, I find that both the respondents affidavit dated 7 December 2000 and 12 December 2000 had failed to comply with the requirement under r. 30(1) of the 1972 Rules and as such the petitioner's preliminary objection is allowed with costs. Thus both the affidavits are inadmissible for the purpose of this petition. With their non-admission, the respondents were left with no grounds to oppose the petition. Thus, after going through all the relevant papers and having satisfied as to the content of the petition (encl. 1), I am now making an under as prayed for in the petition ie, – that the 2nd respondent be wound-up, a provisional liquidator be appointed and the costs of the petition be paid out of the assets of the 2nd respondent.